NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA	*	**NO. 2003-KA-0236**
VERSUS	*	**COURT OF APPEAL**
GREGORY S. BRADLEY	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**
	*	
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APPEAL FROM
CRIMINAL DISTRICT COURT ORLEANS PARISH
NO. 420-824, SECTION "J"
Honorable Leon Cannizzaro, Judge
* * * * * *
Judge David S. Gorbaty
* * * * * *

(Court composed of Judge Joan Bernard Armstrong, Judge David S. Gorbaty, Judge Edwin A. Lombard)

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AFFIRMED; REMANDED FOR SENTENCING

STATEMENT OF CASE

Defendant, Gregory Bradly, was convicted of two counts of armed robbery on May 14, 2001. He was sentenced to serve fifty years at hard labor without benefit of probation, parole or suspension of sentence on each count. The state filed a multiple bill, and the defendant was adjudicated a second felony offender. The trial court vacated the previously imposed sentences and sentenced the defendant pursuant La. R.S. 15:529.1 to fifty years at hard labor on each count without benefits. The sentences were ordered to be served concurrently.

On direct appeal, this court affirmed defendant's conviction, but, on the basis of *State ex rel. Porter v. Butler*, 573 So.2d 1106 (La. 1991), this court vacated the sentences finding that the district court erroneously enhanced both sentences because the offenses arose out of a single transaction. *State v. Bradly*, 2001-1662 (La. App. 4 Cir. 2/20/02), 812 So.2d

1600 (table), *rehearing denied* 3/28/02.

On remand, the trial court resentenced the defendant on March 21, 2002. The defendant filed a writ application in this court alleging that the trial court lacked jurisdiction when it resentenced the defendant as he had a timely filed motion for rehearing pending in this court when he was resentenced. This court granted the writ, vacated the sentence imposed on March 21, 2002, and remanded the case for resentencing. *State v. Bradley*, 2002-K-0702 (La. App. 4 Cir. 5/15/02) (unpublished writ disposition).

At the June 4, 2002, hearing, defendant appeared for resentencing and alleged that he had a pending motion for new trial. Following a recess, the trial court denied the motion.

The trial court then resentenced the defendant to serve fifty years at hard labor on count one, without benefits, to be served concurrently with the sentence in count two as a multiple offender. The trial court denied defendant's motion to reconsider the sentence. The defendant filed a motion for appeal, which the trial court granted.

Appellate counsel for defendant filed a brief with this court and argued in his sole assignment of error that the trial court erred in denying the motion for new trial. The defendant also filed a supplemental appeal brief and raised three assignments of error, one of which challenged his sentence

as excessive. The State filed its brief in opposition and also moved to supplement the record with a copy of the trial transcript and the transcript of the hearing on defendant's motion to suppress the identification. In reply, appellate counsel withdrew the assignment of error, noting that upon review of the two transcripts, his assignment of error lacked merit.

STATEMENT OF FACTS

At trial Officer Scott Monaco testified that about 4 p.m. on November 4, 2000, he responded to a call concerning an armed robbery at The John bar at 2040 Burgundy Street. The officer interviewed four people in the bar and got a description of the robber.

Officer Edward Eichaker testified that he was investigating a shoplifting at the A & P in the 700 block of Royal Street when the store manager pointed to the defendant and said that he had seen his picture on a Crime Stoppers list. The officer detained Bradley, questioned him, and ran his name through the police computer; he learned that Bradley was wanted for armed robbery.

Ms. Annie Muse, a bartender at The John, testified that she was working on November 4, 2001, when the defendant first walked into the bar and stood near the door for a few minutes talking to the owner; then he left. He entered the bar a second time just moments later with a gun in his hand,

and he told everyone to get down on the floor. Ms. Muse was on the floor behind the bar and because of the motor noise, she could not hear what he was saying to the three people on the other side of the bar. Suddenly Kay Vereen, her boss, leaned over the bar to tell her to get up and give the robber the money in the cash register. She did so, and he asked her if she had set anything off. She said she had not. He ordered her back to the floor and he left. Sometime later she selected his picture from a photographic lineup.

Ms. Kay Vereen, the owner of the bar, testified that she was in her business at 4 p.m. on November 4, 2000, because the shifts change then and she wanted to be sure everything was done right. She was talking with the three people in the bar when a man in his late thirties entered. She greeted him, and he asked if this was a new business. She told him it was. He stood in the doorway and looked around; then he said he would come back. Within two minutes he returned with a gun, which he pointed at them and ordered them to the floor. He said, "Give me all the money out of the cash register… now." Annie Muse, who had access to the cash register but is hard of hearing, did not respond, and Ms. Vereen asked if she could speak to Ms. Muse. The gunman indicated she could, and she leaned over the bar and told Ms Muse to give him the money. The gunman began kicking a customer and asked, "You got any wallet, old man?" But the customer was

also hard of hearing and did not answer. Ms. Vereen again intervened and told the gunman that Joe, the customer, could not hear; she offered to give the money in her wallet. He agreed and took her cash and also the money Annie Muse had taken from the cash register. As he prepared to leave, he said, "Nobody move or get up . . . or you're dead." Ms Vereen called 911 as soon as he left. Some days later, she selected the defendant's picture from a photographic lineup and named him as the robber.

ERRORS PATENT; ASSIGNMENT OF ERROR NUMBER 3

A review of the record for errors patent reflects that there is no sentence in place as to count two. When the defendant was initially sentenced as a multiple offender, the trial court vacated the previously imposed sentences. In defendant's initial appeal, this court vacated the mutiple bill sentences and the case was remanded for resentencing. The record reflects that after sentencing the defendant on count one under the provisions of La. R.S. 15:529.1, the trial court failed to reimpose a sentence as to count two which had previously been vacated. Therefore the case is remanded for sentencing as to count two.

The record also reflects a potential error patent with respect to the denial of defendant's motion for new trial occurring immediately prior to his resentencing on June 4, 2002. La. C.Cr.P. art. 873 imposes a twenty-four

delay from the denial of a motion for new trial and sentencing, unless the defendant waives such delay. Defendant's third assignment of error identifies the failure to observe the statutory delay as error; however, the assignment is not briefed. The failure to observe the twenty-four delay has been found to be grounds for voiding the sentence when the defendant attacks his sentence on appeal. *State v. Augustine*, 555 So.2d 1331 (La.1990).

However, there are instances where the failure to observe the article 873 delay has not been found to be reversible error, even though the sentence is challenged on appeal, as this court discussed in *State v. Jefferson*, 97-2949, p. 4-5 (La. App. 4 Cir. 4/21/99), 735 So.2d 769, 772:

> In *State v. Seals*, 95-0305 (La.11/25/96), 684 So.2d 368, *certiorari denied by Seals v. Louisiana*, 520 U.S. 1199, 117 S.Ct. 1558, 137 L.Ed.2d 705 (1997), the Louisiana Supreme Court noted that the mandatory nature of the sentence distinguished the case from *Augustine, supra*, and found that the reversal of the sentence for failure to wait 24 hours between the denial of the motion and imposition of sentence was not warranted in the absence of prejudice. *See also State v. Allen*, 94-1895 (La.App. 4 Cir. 9/15/95), 661 So.2d 1078, *writs denied* 95-2557 & 95-2475 (La.2/2/96), 666 So.2d 1087; *State v. Diaz*, 93-1309 (La. App. 3 Cir.4/6/94), 635 So.2d 499, *writ denied* 94-1189 (La.9/16/94), 642 So.2d 191; *State v. Williams*, 97-970 (La. App. 5 Cir. 1/27/98), 708 So.2d 1086.
>
> In *State v. Bentley*, 97-1552 (La. App. 4 Cir. 10/21/98), 1998 WL 790691, 728 So.2d 405, this court held that any error in failing to observe the 24-hour delay in sentencing after the denial of a motion for new trial did not prejudice a defendant whose original sentence was vacated and he was then found to

be a habitual offender. *See also State v. Brown*, 95-124 (La. App. 5 Cir. 5/30/95), 656 So.2d 1070.

Further, a defendant may implicitly waive the 24-hour waiting period for imposing sentence by announcing his readiness for the sentencing hearing. *State v. Steward*, 95 1693 (La. App. 1 Cir. 9/27/96), 681 So.2d 1007; *State v. George*, 570 So.2d 46 (La. App. 5 Cir.1990); *State v. Ferrell*, 94-702 (La. App. 5 Cir. 5/30/95), 656 So.2d 739, *writ denied* 95-2360 (La. 4/18/97), 692 So.2d 433. The defendant impliedly waived the required 24-hour delay when defense counsel responded in the affirmative when the trial court inquired whether he was ready for sentencing in *State v. Francis*, 93-953 (La. App. 5 Cir. 3/16/94), 635 So.2d 305.

In *State v. Dickerson*, 579 So.2d 472 (La. App. 3 Cir.1991), *writ granted in part*, 584 So.2d 1140 (La.1991), the defendant challenged his sentence on appeal. The appellate court held that failure to observe the 24-hour delay was not reversible error where over a month passed between conviction and sentence, and a presentence investigation report had been ordered, so that there were no indications that the defendant's sentence was hurriedly imposed without due consideration, and the defendant did not argue or in any way show that he was actually prejudiced. *See also State v. Robinson*, 463 So.2d 50 (La. App. 5 Cir.1985).

In finding that the failure to observe the twenty-four delay was harmless error in *State v. Jefferson*, this court noted that the trial court ordered presentence investigation, that three months passed between the conviction and sentence, and that there was no indication that the sentence was hurriedly imposed. Jefferson did not argue that she was actually prejudiced. This court found that there was a sufficient delay between the date of conviction and the date of sentencing to be harmless error where no

prejudice was shown.

In the present circumstance, the June 4, 2002 resentencing marks the fourth time the trial court imposed the identical fifty-year sentence. Over one year passed between the conviction and resentencing. The sentence imposed by the trial court is only slightly longer than the statutorily mandated minimum sentence the defendant could receive as a habitual offender. The defendant did not object to being resentenced on June 4, and noted that he wanted to urge the motion before the court resentenced him. For these reasons, the court finds that the error was harmless.

ASSIGNMENT OF ERROR NUMBER 1

Defendant contends that the trial court erred in ruling on the motion for new trial without allowing him to call witnesses or present evidence. The motion for new trial alleged that the defendant had discovered new and material evidence which has been withheld from the defense in violation of *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194 (1963). Defendant alleged that the State failed to disclose that two witnesses to the robbery not only failed to identify the defendant, but also identified another subject in the photographic lineup. In support of defendant's motion he submitted a copy of the supplemental report prepared by Detective Chris Cambiotti. The report reflects that two witnesses to the robbery, Christina Bishop and

Joseph Sloan, were presented a photographic lineup for possible identification and that both witnesses were unable to make a positive identification. The report states that Mr. Sloan was shown the photographic lineup and stated that he believed that the subject in photograph number five was the perpetrator but that the subject in photograph number four could also have been the perpetrator. The defendant was pictured in the number four position. The report states that after viewing the lineup, Ms. Bishop informed the detective that subjects four and five looked like the perpetrator.

Brady establishes that the prosecution violates due process when it fails to disclose material favorable to the defense. The U.S. Supreme Court has explained that "[t]here are three components of a true *Brady* violation: The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued." *Strickler v. Greene*, 527 U.S. 263, 119 S.Ct. 1936, 1948 (1999).

A review of the trial transcript reflects that during the State's direct examination of Detective Cambiotti he stated that Mr. Sloan was unable to make an identification. On cross-examination, Detective Cambiotti also stated that Ms. Bishop could not make an identification. Defense counsel

also noted that initially Mr. Sloan selected number five and then stated that it could also be number four and that Ms. Bishop did almost the same thing.

Although it appears that defense counsel was aware of the Sloan and Bishop identifications, the record does not reflect whether the defense had actually been provided with a copy of the police report; nevertheless, the information was not suppressed as it was disclosed at trial.

Defendant's specific complaint is that the trial court failed to conduct an evidentiary hearing on his motion for new trial. Article 852 of the Louisiana Code of Criminal Procedure provides that a motion for a new trial "shall be tried contradictorily with the district attorney." In *State v. Davis*, 00-278, p. 8 (La. App. 5 Cir Cir. 8/29/00), 768 So.2d 201, 208, the court reviewed the jurisprudence regarding the need to conduct an evidentiary hearing on a motion for new trial:

> Although art. 852 requires contradictory trial of motions for new trial, "historically the method of hearing motions for new trial has been left to the trial judge's discretion." *State v. Jackson*, 570 So.2d 227, 231 (La. App. 5 Cir.1990).

> The method of hearing motions for new trial is left to the discretion of the judge. If the reading of the motion imparts to him sufficient knowledge to enable him to intelligently dispose of the matter, he cannot be arbitrarily required to delay his ruling for the purpose of further hearing or argument. The accused is not entitled to compulsory process to obtain witnesses in support of his motion for a new trial, and the examination of witnesses to

> prove newly-discovered evidence is within the discretion of the trial judge.

State v. Varnado, 154 La. 575, 97 So. 865, 868 (1923).

> In *State v. Barfield*, 292 So.2d 580 (La.1974), the Supreme Court found no error when the trial court disposed of the motion for new trial on the basis of the affidavits submitted with the motion. The court observed, "An evidentiary hearing was not necessary and would have been merely repetitious because of the affidavit." 292 So.2d at 582.

Under the present circumstances, we cannot find error in the trial court's summary disposition of defendant's motion. The claim that the information concerning the Bishop and Sloan identifications was withheld is clearly without merit. The information was elicited for the jury at trial, and there was no need for the court to hear testimony in order to determine that the information was not newly discovered or had not been withheld.

ASSIGNMENT OF ERROR NUMBER 2

Defendant alleges that the trial court imposed an excessive sentence and failed to comply with requirements of La. C.Cr.P. art. 894.1. Defendant was sentenced as a second offender to serve fifty years imprisonment at hard labor without the benefit of parole, probation, or suspension of sentence under the provisions La. R.S. 15:529.1(A)(1)(a), which provides:

> If the second felony is such that upon a first conviction the offender would be punishable by imprisonment for any term less than his natural life, then the sentence to imprisonment

> shall be for a determinate term not less than one-half the longest term and not more than twice the longest term prescribed for a first conviction…

As a conviction for armed robbery carries a maximum sentence of ninety-nine years at hard labor, the defendant's sentence is slightly lengthier than the minimum sentence mandated by law.

Prior to imposing sentence, the trial court stated:

> All right as to Gregory Bradly, let the record reflect Mr. Bradly was found guilty of two counts of armed robbery. The Court also learns, State, that Mr. Bradly has a prior conviction for an attempted first-degree robbery. I understand that charge was initially reduced from first-degree robbery to an attempt first-degree robbery. This incident did involve at least three people in a barroom. They were ordered to lie face down. The contents of a cash register and some other personal property was taken. He was identified by the victims as the perpetrator of this offense.
>
> A very serious crime, sir, a very serious crime. I don't have a whole lot of play here given your criminal history.

A sentence may be reviewed for constitutional excessiveness even though it is within statutory guidelines. *State v. Cann*, 471 So.2d 701, 703 (La. 1985). In reviewing a sentence for excessiveness, the appellate court must first determine whether the trial court complied with La. C.Cr.P. art. 894.1 when it imposed the sentence and then determine whether the sentence is too severe given the circumstances of the case and the defendant's background. *State v. Lobato*, 603 So.2d 739, 751 (La.1992). If the sentence

needlessly imposes pain and suffering and is grossly out of proportion to the gravity of the offense so as to shock our sense of justice, then it may be determined to be unconstitutionally excessive as violative of La. Const. art. 1, Sec. 20 (1974). *Id*. However, a sentence imposed will not be set aside absent a showing of manifest abuse of the trial court's wide discretion to sentence within statutory limits. *Id*. The articulation of the factual basis for a sentence is the goal of LSA C.Cr.P. art. 894.1, not rigid or mechanical compliance with its provisions. Where the record clearly shows an adequate factual basis for the sentence imposed, remand is unnecessary even when there has not been full compliance with La. C.Cr.P. art. 894.1. *Id.*

As noted in *State v. Burns*, 97-1553, p. 7 (La. App. 4 Cir. 11/10/98), 723 So.2d 1013, 1018 "[t]he purpose behind La.C.Cr.P. art. 894.1 is to provide an explanation for a particularized sentence when the trial court is given discretion to choose a sentence tailored to the offender's circumstances from within a legislatively provided sentencing range." Given that the defendant was sentenced to the approximate statutorily mandated minimum sentence, the court's recitation of the facts and the defendant's previous criminal history demonstrates adequate compliance with La. C.Cr.P. art. 894.1.

A minimum sentence imposed on a multiple offender by the Habitual

Offender Law is presumed to be constitutional, and the defendant bears the burden of rebutting the presumption. *State v. John*son, 97-1906 (La.3/4/98), 709 So.2d 672. Other than suggest that the trial court failed to comply with art. 894.1, defendant does not suggest any basis to consider that his sentence is constitutionally excessive. The assignment of error lacks merit.

CONCLUSION

Accordingly, for the foregoing reasons, we affirm the trial court's denial of the motion for new trial and the sentence on count one, and remand this matter for sentencing on count two.

AFFIRMED; REMANDED FOR SENTENCING